Supreme Court, U.S.
FILED

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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 2001

LUIS ALBERTO RODRIGUEZ,
Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE and
DRUG ENFORCEMENT ADMINISTRATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SECOND CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in failing to follow a Tenth (10th) Circuit decision.

   (a) The Court of Appeals for the Second Circuit has entered a decision in conflict with the decision of another, as to call for an exercise of this Court's supervisory power;

   (b) A United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

2. Whether the Court of Appeals erred in affirming a dismissal of Luis Rodriguez's Motion for Return of Property and allowing the government to forfeit approximately $366,000.00 in U.S. currency by default and without a hearing on the merits.

3. Whether the Court of Appeals erred in determining that Luis Rodriguez had an adequate remedy at law to contest the seizure of his currency; Whether the Court of Appeals erred in determining that in a judicial forfeiture proceeding, a claimant can challenge the legality of a seizure.

4. Whether the Court of Appeals erred in affirming a forfeiture of approximately $366,000.00 in U.S. currency, an amount far in excess in proportion to the procedural defect the court alleges to have occurred.

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PETITION FOR WRIT OF CERTIORARI

Rodriguez respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit (App., infra, A26-A30).

OPINIONS BELOW

Luis Alberto Rodriguez appealed from the Judgment and Order of the Hon. Carol Bagley Amon of the United States District Court for the Eastern District of New York, dated August 12, 1999 (App., infra, A1-A24), granting the U.S. Government's Motion to Dismiss the Appellant's Motion for Return of Property under Rule 41(e) of the Federal Rules of Criminal Procedure (the "41(e) motion").

On appeal, the Court of Appeals for the Second Circuit affirmed the District Court's dismissal and refusal to hear the merits of Rodriguez's case (App., infra, A31-A32).

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on February 22, 2001, and denied Rodriguez's Motion to Reargue, which denial was entered July 5, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

STATUTES

19 U.S.C. §1609, §1615

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V.
U.S. Const. Amend. VIII.

STATEMENT OF THE CASE

This case involves an attempt by the United States government (the "Government") to forfeit approximately $366,000.00 in currency seized by agents of the U.S. Drug Enforcement Administration ("DEA") and agents of private and quasi-government entities working in concert with the DEA on November 7, 1997 without demonstrable cause. Such forfeiture is not supported by the law or the facts and, if permitted, would place in jeopardy, without probable cause, persons such as Luis Alberto Rodriguez ("Rodriguez").

A. The Seizure

On November 7, 1997, when Mr. Rodriguez was at LaGuardia Airport preparing to board his flight to Miami with his daughter, the airport agent inspected their tickets and Mr. Rodriguez passed his portfolio through the x-ray machine. He was not carrying any other luggage nor had he checked any

bags. He was carrying approximately $366,000 in cash, with documents pertaining, in part, to that cash. After asking what was in the portfolio, Rodriguez advised the security agent that it was money, and disclosed how much, approximately. Thereafter, a uniformed agent was called, along with a second, Spanish-speaking person. Rodriguez does not speak, read or understand any English. The Spanish-speaking person asked (in Spanish) Rodriguez's occupation, to which he responded (in Spanish) "Businessman. ... I buy gold and jewelry." This person asked questions regarding Rodriguez's flight, and reviewed the documents in his portfolio, including the currency declaration that was filed when the currency first entered the United States. This Spanish-speaking person told Rodriguez that everything was in order.

At that point, the uniformed officer, called over by the airport security agent, took the documentation and asked questions relating to various markings thereon. The uniformed officer said "OK, very well." Thirty minutes later two men dressed in civilian clothes arrived and spoke with the uniformed officer. They told Rodriguez and his daughter to follow, and led them into a waiting police car which took them to a local station at LaGuardia Airport. Upon arriving at the station of the Port Authority police department at approximately 7:30 P.M., Mr. Rodriguez was told to sit and was asked several questions. Mr. Rodriguez presented to the Port Authority police all of the money he was carrying and, after the initial questioning additional officers frisked the person of Mr. Rodriguez and his daughter and searched her pocketbook. At no point did anyone identify himself or herself by name, badge or identification card.

Telling Rodriguez that he would be able to return the next day to pick up his money, the Port Authority police retained the currency and took photos of both Mr. Rodriguez and his daughter. When asked for a reason, the officer said that the photographs were for identification purposes and would help

expedite the process when Mr. Rodriguez returned to claim his money. Fifteen minutes later two more individuals came in -- DEA Special Agent Brian Fitzpatrick and one other. Fitzpatrick commented "Big Fish" while typing something into a computer. "Usted coca" was his next accusation, to which Mr. Rodriguez explained (in Spanish) "you are making a mistake. Don't call me a drug dealer." Because in retrospect he was mistaken, Mr. Fitzpatrick, in an Affidavit he made to the court below, failed to disclose that he had checked a computer to determine whether Rodriguez or his daughter had any TECS history.[1] Mr. Rodriguez's daughter started crying and asked, "why are you calling us drug dealers, you are making a big mistake."

B. The Administrative Proceedings

On November 7, 1997, Rodriguez and his daughter were detained and searched, and his money seized by the U.S. DEA.

On December 4, 1997, Rodriguez's counsel, Carl Soller, had a telephone discussion with DEA Special Agent Brian Fitzpatrick. In that discussion Fitzpatrick acknowledged the taking of Mr. Rodriguez's cash, but refused, despite counsel's objection to the seizure and request for information supporting its merits, to say more.

On December 29, 1997, Soller telephoned DEA Agent Fitzpatrick for a second discussion relating to the seizure and Rodriguez's objections thereto. Fitzpatrick made no mention

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[1] Treasury Enforcement Communications System ("TECS"). As part of Customs' information management strategy, TECS provides support for federal law enforcement missions by aiding inspection personnel at borders of and ports of entry into the United States. It has been termed by Customs as "the clearinghouse for law enforcement data." See CUSTOMS SYSTEMS AND INFRASTRUCTURE OVERVIEW.

that the publication process had begun in order to initiate a forfeiture of the currency. Despite this discussion and the objections raised therein, and despite that neither Rodriguez nor his daughter received a notice of seizure, the DEA continued its publication of notice.

On January 8, 1998 Soller sent a letter to the DEA explaining that "the funds confiscated were in no way related to any drug offense" and that the Notice of Seizure was deficient because it did not specify the related offense or the relevant seizure provision, which, as pointed out in the correspondence to Fitzpatrick, was "information ... absolutely essential for us to properly proceed with our petition for remission under Title 19, Sec. 1607 et seq."

On January 20, 1998, Soller had another telephone discussion with the DEA, this time with an attorney (name not certain), regarding the illegal seizure. The very next day the DEA sent a response to Mr. Soller's January 8 letter explaining that in its opinion the Notice of Seizure was constitutionally sufficient in content.

In the January 21, 1998 response to Soller's letter, the Government set forth that pursuant to the regulations at 28 CFR 9.5(a)(4) "the Government's legal basis for seizing property and pursuing forfeiture is not addressed during the petition process."

Left with no alternative method to contest the illegal seizure, and in need of a judicial avenue to argue that the Government had no probable cause to seize the currency, Rodriguez filed and served the underlying 41(e) motion upon the DEA. The DEA proceeded to forfeit the money on February

23, 1998, almost two weeks after the 41(e) motion was filed.[2] The Government in turn moved to dismiss the 41(e) motion. The District Court dismissed the motion on the grounds that it lacked subject matter jurisdiction, the property having been administratively forfeited. At no time throughout our written and verbal communications was Rodriguez told why his money was taken from him.

The Second Circuit, refusing to follow 10th Circuit case law that allows the filing of a 41(e) motion in a district court, affirmed the forfeiture, thereby allowing the Government to keep $366,000.00, with no legal or equitable justification.

REASONS FOR GRANTING WRIT

I. THE SECOND CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH THE DECISION OF THE TENTH (10TH) CIRCUIT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

Aside from ignoring this Supreme Court's idea and concept in the 1983 case U.S. v. $8,850, 461 U.S. 555, 103

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[2] A typical forfeiture might take place no sooner than four months from the date of seizure, *See Sterling v. U.S.* 749 F.Supp. 1202 (E.D.N.Y. 1990). Reminiscent of the Government's behavior in *Muhammed v. Drug Enforcement Administration*, 92 F.3d 648 (8 Cir 1996), where the court noted that "the motion evidently triggered administrative forfeiture proceedings," Id. at 650, the Government responded to the filing of the 41(e) motion by immediately proceeding with a forfeiture. The Government, actually, asked for an extension of time in which to respond to the motion, and then used that time to forfeit the currency.

S.Ct. 2005, 76 L.Ed.2d 143 (1983)[3], the District Court rejected the holding in the Tenth Circuit decision in Floyd v. U.S., 860 F.2d 999 (10th Cir. 1988), a case that supports a Court's equitable jurisdiction. The Court did, however, cite and rely upon conflicting decisions outside the Second Circuit, namely the Sixth (6th) and Eleventh (11th) Circuits.

The court in Floyd explained that:

> The equitable nature of 41(e) is well established, and we have no difficulty reading equitable constraints into the text of the [drug] statute for that purpose. Id. at 1003.

In dismissing Floyd, the District Court in Rodriguez explained that it is not bound by a Tenth Circuit opinion ("The Court notes initially that it is not bound by a decision from the Tenth Circuit." (Decision and Order of Hon. Carol B. Amon, at A17), and cites factual differences in the two cases.

The Court does, however, rely on the Eleventh Circuit decision in $67,470.00 v. United States, 901 F.2d 1540 (11 Cir. 1990), the Sixth Circuit decision in Shaw v. United States, 891 F.2d 602 (6 Cir. 1989), and the decision in United States v. One 1988 Mercedes Benz, VIN No. WDBBA48D5JA087263, 719 F.Supp. 595 (E.D.Mich. 1989) to support the reverse position -- that it would "not come to the aid of a litigant who chooses not to pursue available legal avenues for relief." $67,470.00 v. U.S., at 1545.

The Court relies on the decisions in the 1987 Jeep

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[3] Holding, on different facts, that when the claimant in a currency seizure case "believes the seizure was improper, he could file a motion under Federal Rule of Criminal Procedure 41(e) for a return of the seized property." 103 S.Ct. at 2014, 461 U.S. at 569.

Wrangler case and Onwubiko v. U.S., 969 F.2d 1392 (2d Cir. 1992), along with other District Court cases (dealt with below) to support the proposition that the administrative forfeiture in this case cut off all of the District Court's jurisdictional authority to hear the case on its merits. Again, equitable jurisdiction is missed. Onwubiko does not support this holding at all. As a matter of fact, the Second Circuit in that case, on much weaker facts, reversed the District Court's judgment (which upheld a summary forfeiture) and directed that a judicial proceeding be instituted. Onwubiko, 969 F.2d at 1400.

In Onwubiko, the claimant was arrested and pled guilty to the charges. Most important, the Court said nothing of a 41(e) motion not being appropriate in a case such as Rodriguez'. The Court only noted that 41(e) motions are not brought after the conclusion of a criminal case, and that it is inappropriate for the District Court in that case to deem the plaintiff's submission (it was in the form of a letter to the Court) a 41(e) motion. Id. at 1396-97. Even in those circumstances, where the submission to the Court was made in the form of an unsworn statement with no legal support, the Court was instructed, on remand, to entertain the substance of the submission, Id. at 1394-95, and to exercise its jurisdiction. Id. at 1398.

Most striking in Onwubiko, is that the Court reasoned a 41(e) motion is not brought (in the criminal context) after the conclusion of a case. The same holds true in Toure v. U.S., 24 F.3d 444 (2d Cir 1994) (the plaintiff was arrested, pled guilty, waited over four months since the Notice of Seizure was mailed, and brought an action to recover his property) and in One 1987 Jeep Wrangler (the plaintiff was arrested, pled guilty, and, almost three months later, filed a motion seeking return of his property).

The District Court below also rejected the holding in Camacho v. U.S., 645 F.Supp 725 (E.D.N.Y. 1986)

(McLaughlin, J.), as "wrongly decided" and "undermined by the more recent Second Circuit decisions in One 1987 Jeep Wrangler and Onwubiko." (App. A15) Factually, Camacho remains the single case almost precisely on point; the district court there recognized that a 41(e) motion was "properly made," and that "[the] Court has subject matter jurisdiction." Id. at 727.

As in the instant case, the claimant in Camacho entered LaGuardia Airport heading for Miami, Florida, the airport officer conducted an x-ray scan that revealed currency and followed that with a questioning, (Rodriguez's money was not in any way hidden), the claimant was allowed to go free and the money was retained. The claimant's attorney sent a letter to the DEA questioning the propriety of the seizure and demanding return of the money and the Government then initiated forfeiture proceedings. In Rodriguez's case they did not even wait that long. In both cases, correspondence contesting the seizure was forwarded to the Government, and neither an administrative claim was filed nor a bond posted. Seven months later in Camacho, a successful 41(e) motion was brought. Id. In Rodriguez's case, less than two weeks had passed before the 41(e) motion contesting the seizure was brought.

We respectfully suggest that the rationale in Camacho should apply here.

II. THE SECOND CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The issues raised herein and contested in various forms and with varying results by the district courts and courts of appeals have not to date been resolved in a clear manner by the U.S. Supreme Court.

In 1999 the Legislature did its part by passing the Civil Asset Forfeiture Reform Act of 1999, and the Supreme Court did its part in 1997 to address the issue of Excessive Fines in currency seizure and forfeiture cases. See below, Point 4(b): The Legal Climate Concerning Civil Asset Forfeitures; citing U.S. v. Bajakajian, 524 U.S. 321; 118 S.Ct. 2028; 1998 U.S. LEXIS 4172; 141 L. Ed. 2d 314 (Decided June 22, 1998).

The Supreme Court has not, however, made clear the procedures a claimant should take when faced with an illegal seizure – or any seizure for that matter. Courts have jurisdiction, but exercise that jurisdiction intermittently and randomly. Some courts hear 41(e) motions while others do not.

III. THE COURT OF APPEALS ERRED IN DETERMINING THAT LUIS RODRIGUEZ HAD AN ADEQUATE REMEDY AT LAW TO CONTEST THE SEIZURE OF HIS CURRENCY; THE COURT OF APPEALS ERRED IN DETERMINING THAT IN A JUDICIAL FORFEITURE PROCEEDING, A CLAIMANT CAN CHALLENGE THE LEGALITY OF A SEIZURE.

The District Court should have heard the Rule 41(e) motion or should have fashioned an alternative judicial remedy for Rodriguez to argue that his property was illegally seized. The District Court had equity jurisdiction to hear the motion under Rule 41(e) or to fashion the alternative remedy.

The avenues set forth by the District Court, and affirmed by the Second Circuit as adequate remedies for Rodriguez do not afford him the opportunity to contest the legality of the Government's seizure. At best, Rodriguez would have to file a claim and bond and await the institution of judicial forfeiture proceedings by the Government which could then wait a year or more to file a forfeiture suit, by even the District Court's and

the Second Circuit's admissions. More important, the Government, to bring such an action, need only show probable cause to forfeit as of the time the action is filed. The Government's forfeiture action does not necessitate a finding of a proper seizure, an essential element to the establishment of an adequate remedy at law.

A. The Courts Should Have Heard the 41(e) Motion Under Its Equity Jurisdiction - Rule 41(e) Affords the Only Remedy for the Illegal Seizure in this Case

1. Background:

Rule 41(e) of the Federal Rules of Criminal Procedure provides:

> (e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the District Court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property.
> Fed. R. Crim. P. R. 41(e).

The United States Supreme Court, in U.S. v. $8,850, 461 U.S. 555, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983), held that when the claimant in a currency seizure case "believes the seizure was improper, he could file a motion under Federal Rule of Criminal Procedure 41(e) for a return of the seized property." 103 S.Ct. at 2014, 461 U.S. at 569. In that case, the Supreme Court found that the claimant's failure to either request a judicial forfeiture action or, alternatively, to file a 41(e) motion "can be taken as some indication that [he] did not desire an early judicial hearing." Id. The facts in this case differ, but the Supreme Court does maintain that where a claimant feels that due process has been violated by an illegal search and seizure, 41(e) is

appropriate for lack of an adequate civil remedy.

Without a 41(e) motion, Rodriguez is left entirely to the whims of the Government which is reviewing the facts of its own ex-parte seizure without the necessity of reviewing the legality of the search and seizure to begin with. The Fifth Amendment assures claimants like Rodriguez due process of law. U.S. Const. Amend. V.

The Government's position in this case, instead of conceding that it has the burden of affording due process, places the onus on the deprived person, in this case stripped of a substantial sum of his money, to show lack of due process. See U.S. Const. Amend. V.

2. The District Court's Authority – 41(e):

Where a formal criminal action is pending before the District Court, there is no dispute that the Court may hear a 41(e) motion relating to that action. Even where no formal criminal action is pending, the Courts have entertained 41(e) motions on principles of equity. The Fifth Circuit stated well that Rule 41(e) is a "crystallization of a principle of equity jurisdiction [which] persists as to situations not specifically covered by the rule." Hunsucker v. Phinney, 497 F.2d 29, 34 (5 Cir. 1974). Thus, where there is no "suggestion of criminal proceedings," a 41(e) motion "is more properly considered simply as a suit in equity rather than one under the Rules of Criminal Procedure." Richey v. Smith, 515 F.2d 1239, 1245 (5 Cir. 1975).

The Courts below should have recognized the impropriety of forcing a claimant to await formal action before seeking the return of money that is illegally seized. Claimants such as Rodriguez could otherwise be forever deprived of the 41(e) motion and the Government would be in a position to

flounder with cases such as these without ever being compelled to support the legality of its seizure outside of a judicial forfeiture proceeding, and even there the Government is restricted only by the relevant statute of limitations.

In Matter of 6455 South Yosemite, etc., 897 F.2d 1549 (10th Cir. 1990), the Tenth Circuit explained that Rule 41(e) is to be available to persons who are not yet defendants in a criminal case if they seek recovery of property seized by the Government. Id. at 1554. In Rodriguez's case, there was never a threat by the Government that an indictment would be returned. The Court's equitable jurisdiction, therefore, comes into play immediately to allow Rodriguez to appropriately attack what the Government has done in making the seizure.

Rule 41(e) is designed to combat overreaching and abuses of the seizure authority. United States v. Rapp, 539 F.2d 1156 (8th Cir. 1976). Rule 41(e) affords a remedy for the victims of unlawful searches and seizures.

The rule itself provides, in pertinent part, that:

> A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the District Court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. Fed.R.Crim. P. R. 41(e).

In Roberts v. United States, 656 F.Supp. 929 (S.D.N.Y. 1987), reversed on other grounds, 852 F.2d 671 (2d Cir. 1988), cert. denied 488 U.S. 993 (1988), the issue before District Judge Sweet was whether or not to read an "irreparable harm" standard into Rule 41. Judge Sweet relied upon the Supreme Court's decision in Schiavone v. Fortune, 477 U.S. 21, 106 S. Ct. 2379 (1986), a case that involved Rule 15(c) of the Federal

Rules of Civil Procedure. The Supreme Court held that because the plain meaning of the rule was unambiguous, it was not subject to interpretation and the rule was accepted "as meaning what it says." Schiavone v. Fortune, 106 S.Ct. at 2385. Since the rule said nothing about a showing of irreparable harm, District Judge Sweet declined to read those words into it. Roberts v. United States, 656 F.Supp. at 932.

Magistrate Judge Francis followed Judge Sweet's lead and refused to graft an irreparable harm requirement onto Rule 41(e). See United States v. The Premises Known as 25 Coligni Ave., New Rochelle, New York, 120 F.R.D. 465 (S.D.N.Y. 1988). He further stated: "Nor should the litigant be required to justify the need to vindicate constitutional rights." Id. at 468-69. See also In re First United Financial Corp., 620 F.Supp. 1450, 1452 (E.D.N.Y. 1985).

3. The District Court's Authority – "Anomolous Jurisdiction":

Recent case law has limited the hearing of 41(e) motions in the District Court under the Court's "anomalous" or equitable jurisdiction (a) where criminal proceedings are pending when the motion is brought or (b) where the movant has no readily available statutory or other civil remedy to contest ownership of property and the lawfulness of a seizure. Boyd v. U.S. Dept. of Justice, 673 F.Supp. 660 (E.D.N.Y. 1987).

While "anomalous" jurisdiction has resulted in federal courts hearing motions to facilitate the return of improperly seized property, Boyd, 673 F.Supp at 663, citing U.S. v. Martinson, 809 F.2d 1364 (9 Cir. 1987), the District Court in this case denied Rodriguez's right to be heard on the basis that administrative forfeiture proceedings had begun. The Court then concluded that even if it could exercise equitable jurisdiction, it would not be appropriate in Rodriguez's case

[because] there needs to be "a showing that there is no adequate remedy at law," [citing] Boyd, United States v. An Antique Platter of Gold, 95 MAG 2167 (NRB), 1995 WL 758762 (S.D.N.Y. Dec. 22, 1995), i.e. if there is an available statutory or civil remedy to contest ownership of property and lawfulness of seizure, a court should not find anomalous jurisdiction. The key factor is the adequacy of the movant's remedy at law, Boyd, 673 F.Supp. at 664, and the determination turns on the facts and circumstances of the particular case at bar. Matter of $91,000.00, 715 F.Supp 423, 434 (D.R.I. 1989).

4. The Issue of Adequate Remedy is a Factual Issue:

The issue of an "adequate remedy" was treated by the district court as a "given." The court erred by asserting that Rodriguez's options were "adequate" without assessing the practicality of his options (or lack of options). The district court decided that because the statute provides a remedy, any claimant who is subject to that statute and who uses that remedy is sufficiently protected.

The recently enacted Civil Asset Forfeiture Reform Act and its accompanying legislative history provide insight, as well as wrenching stories and incidents resulting from the Government's capricious taking and forfeiting of currency and property under the guise of a drug war. The June 11, 1997 Judiciary Committee meeting for the Civil Asset Forfeiture Reform Act (H.R. 1658) comprises a majority of the Act's legislative history. The purpose of the reference to the legislative history is to shed light on the circumstances that led to the recent passing of the Civil Asset Forfeiture Reform Act, and the very circumstances that Rodriguez found himself in. This climate, and the practicalities surrounding forfeiture and the damage it has done to families should have been considered by the District Court when it made its finding of "adequate remedy."

To clarify, the legislative history is not referenced herein because the law should apply retroactively, as much as because it sheds light on what occurs when Government seizures and forfeitures take place. It sheds light on what would have been Rodriguez's likely fate had he gone down the seemingly endless and abusive "claim and bond" route.

By way of summary, the Congressional Meeting included testimony from individuals who had had first hand experience with civil asset forfeiture. Billy Munnerlynn was the owner of a once successful air charter service who spoke of his struggle to recover one of his airplanes seized by the Drug Enforcement Administration. E.E. "Bo" Edwards III represented Richard T. Lowe, M.D. in his suit to recover more than $2.8 million of his life savings that had been improperly, though innocently deposited in a bank account he had established to benefit a private academy in his hometown. F. Lee Bailey also testified about his representation of a Florida couple whose business has been effectively shut down by a civil asset forfeiture action.

In all these cases, the delays, fees and other effects on the lives of innocent owners are astounding. After going through a civil trial, Billy Munnerlynn explains:

I used up most of my savings, I had to hire a criminal attorney in the early aspect. Once it went to civil, this first attorney couldn't handle it so I had to hire another attorney. It was a constant thing fighting them to keep my Lear jet and my property. I went to a jury trial, eight of my peers. They ruled in my favor twice, said I should get all my money back. The Government had taken all my money and my Lear jet. The judge reversed this favorable verdict, and ordered me to another trial.

Anyway, I was forced to settle the thing. To even make

it worse, later on I don't know why this all happened. You have to understand that in the years that I have been flying this airline, working as a transport pilot flying jets out of Salt Lake City, I flew for Majestic Airlines, for many airlines. All of a sudden I could not even get a job with these airlines. These airlines haul mail that's Federal. I was put on a list. I can't think of the name of it, but the DEA uses it to identify possible drug runners and gun runners and money launderers. I couldn't work anywhere. Basically, I was forced to sell the other prop airplanes that I had flying into the Grand Canyon. I had four prop planes, a Malibu a 210, and a training plane. I was forced to sell all these aircrafts to pay my attorney bills.

Now that all these things are gone, all the money is gone. I filed for bankruptcy. We lost our home. We lost all our aircraft. I lost my airline certificate. The Federal Government told me they would wait to see the outcome of the forfeiture hearings. It wouldn't be right for them to destroy my certificate, I spent over $200,000 getting that certificate. My pilot license and Mr. Bailey, I believe, can confirm this, cost well over $80,000. The Lear jet cost $500,000. I can assure this committee I have never ever given thought to ever breaking the law, much less flying money launderers, drug people. I am far removed from that. I would never ever risk what I had for that. Id. at 13-15.

In describing how a doctor's life savings were seized, E.E. "Bo" Edwards III stated:

There is such a strong tendency in the way that law enforcement agencies use civil forfeiture today, and the way they have been using it for a decade, to seize property when they find it and justify it later. That is especially true in cases where no criminal charges are brought against the owner of the property. Id. at 23. He further explains that Current law allows—indeed, promotes—law enforcement agencies to seize

property without cause, and then undertake an investigation, including the use of discovery and depositions from claimants, to locate evidence which can be used to forfeit the property. So long as the burden of proof remains on the property owner, such a greedy, strong-armed approach is encouraged. A sizable portion of civil forfeitures occur against property owners who are never charged with any criminal offense.

Institutional greed is inevitable when the law allows the initial seizure with so few safeguards. 19 U.S.C. 1615, which applies to all drug (881) and currency violation (981) forfeitures, provides that "probable cause shall be first shown for the institution of such suit or action...." Some courts have read this language to mean what it says. That is, the government must demonstrate on the day the forfeiture case is filed in district court that it possessed proof establishing probable cause to believe the property in question is subject to forfeiture. The government should not be allowed to use depositions and discovery to make a case when it had no case at the outset. Id. at 40, citing , e.g., United States v. $91,960.00, 897 F.2d 1457, 1462 (8th Cir. 1990); United States v. Monkey, 725 F.2d 1007, 1011 (5th Cir. 1984).

The point made consistently by the legislative history is that the procedures put in place and declared "adequate" by the court below are, at times, simply inadequate.

B. The Remedies Offered to Rodriguez Were Inadequate:

The District Court erred in finding that "[o]nce the administrative proceedings are commenced, the statute governing the filing of a claim and bond provides an adequate remedy." (Amon Decision and Order, at A13.) The Court, at oral argument, did acknowledge that of the two options of either petitioning the DEA on the administrative level, or filing a

claim and bond to have a judicial forfeiture action filed in the District Court, the former is barely a viable alternative.[4]

In its response to the Soller letter of January 8, 1998, the Government, too, makes it clear that pursuant to the regulations at 28 CFR 9.5(a)(4) "the Government's legal basis for seizing property and pursuing forfeiture is not addressed during the petition process."

The remaining claim and bond procedure, however, is also an inadequate remedy for contesting the seizure:

1. The Different Burdens of Proof:

When bringing a forfeiture action, the Government is bound to meet its burden of proof with respect to the seized property as of the time the action is filed. This was acknowledged by the Government at oral argument. (Amon Decision and Order, at 14.) According to the Government's position in this case, there is no procedure, nor should there be, for contesting the legality of the seizure itself, i.e. for bringing an action in court that would require the Government to meet its burden of probable cause at the time of the seizure. In theory, then, the Government can illegally seize property, await a claim and bond, delay the filing of an action for at least one year (see Argument 2: "The Delay the Government Can Impose," infra), and never be required to establish a legal seizure.

The Irony: With a seizure pursuant to a search warrant,

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[4] At oral argument, Soller made the claim that the District Court has "no ability, if [Rodriguez] chose the administrative route, to review the Government's decision on how much is to be forfeit." The Court responded: "That's true, but you could have chosen number two, which is you file a claim and bond, and it is before the Court ..."

the Government would not argue against the viability of a 41(e) motion. Thus, where at least one judicial authority reviews the warrant and puts his/her imprimatur on it, the seizure is subject to judicial review. With an ex-parte DEA seizure, where no judicial authority is involved in the taking, the Government argues, and the District Court decided, that there is no entitlement to such review.

Indeed with respect to the $366,280 seized, there was neither a search warrant, nor any exception to the search warrant requirements; Mr. Rodriguez and his daughter were detained without probable cause and forced to accompany Government agents to an automobile to be transported off the airport to the office of, presumably, the Drug Enforcement Agency or its agents.

2. The Delay the Government Can Impose:

"[T]he determination of when the Government is to proceed against a piece of property is seemingly discretionary and limited only by the relevant statute of limitations." United States v. One 1987 Jeep Wrangler Auto. VIN No. 2BCCL8132HBS12835, 972 F.2d 472, 480 (2d Cir 1992). The Court rejected Rodriguez's argument that by filing a claim and bond, Rodriguez and his money were subject to the Government's discretion as to how and when the action would be brought once the claim and bond were filed. The Court did make mention of the five year statute of limitations, but relied also on the Due Process Clause, citing U.S. v. $8,850; Creative Electronic, Inc. v. United States, No. 95-CV-0302 (RSP/GJD) 1995 WL 494002 at *6-7 (N.D.N.Y. Aug. 16, 1995), in which the Customs Service (incorrectly named by the lower court as the DEA) was directed to initiate a judicial forfeiture action after a sixteen month delay.

In either case, Rodriguez would not get the initial filing

of a forfeiture action until after a year has passed, in the best scenario, and would likely not get a decision on the merits (of the forfeitability of the property, and not even the legality of the seizure) until long thereafter. The amount of money at issue and the circumstances of the seizure in this case should have warranted an immediate hearing in court.

C. The Claim and Bond Are Not An Exclusive Remedy; The Administrative Process, ipso facto, Does Not Remove this Case From the District Court's Jurisdiction Below, the Government argued that:

The statute [19 U.S.C. §1609] implicitly recognizes that the filing of a claim and cost bond is the sole method by which a claimant stops the administrative forfeiture and obtains review in district court of the probable cause for the forfeiture.

Respondent Brief to the Court of Appeals at p. 13. This argument is based on the language in the statute whereby if a claim and bond are not filed, a seizing agency shall declare a forfeiture. See 19 U.S.C. §1609.

Aside from its conclusion that the statute makes the implication that the claim and bond procedure is an exclusive and sole remedy, the Government provides no explicit legal basis for excluding other remedies or judicial means. The single case cited by the Government is a Seventh Circuit case, and it quoted without regard to its context. See Respondent Brief at 13, and Willis v. United States, 787 F.2d 1089, 1094 (7th Cir. 1985), cited therein.

First, in that case, the claimant filed a petition with the seizing agency, chose the administrative route, and then filed a complaint in district court over a year after the seizure, and over nine months after being denied on the petition. Willis, at 1091-92. Further, the claimant argued that the notice failed to

inform him of the fact that the administrative route would deprive him of a judicial hearing. In correcting this erroneous reading of the legal framework, the court held that "since the notice given Willis [the claimant] adequately informed him of his rights, his failure to pursue a hearing on probable cause effectively waived his opportunity to do so now." Id., at 1093-94.

Emphasis should be placed on the term "now" used by the court in its decision-- a term omitted by the Government in its Brief. Notice should also be taken that the court speaks in general terms, indicating simply that the claimant should have pursued a probable cause hearing, as did Rodriguez in this action.

D. Without Invoking its Equitable Jurisdiction, the Court Should Have Treated The 41(e) motion as (a) a Motion Seeking Mandamus Compelling the Initiation of a Judicial Forfeiture Action; (b) a Motion for a Stay of Administrative Forfeiture Pending the Filing of a Claim and Bond; or (c) Any Other Remedy Which the Court Could Have Deemed Appropriate in Order to Afford Rodriguez a Judicial Hearing on the Merits of the Seizure

The circumstances of this case dictate that absent the right to file a 41(e) Motion, which Rodriguez should have been granted, the District Court should have at least treated the 41(e) motion as anything other than the Government's ticket to final forfeiture of the currency. In Onwubiko, (discussed under Subheading C., supra) this Court reversed the District Court's judgment (which upheld a summary forfeiture) and directed a judicial proceeding be instituted. Onwubiko, 969 F.2d at 1400.

IV. FORFEITURE IS TOO DRASTIC IN THIS CASE

The court of appeals erred in affirming a forfeiture of approximately $366,280.00 in U.S. currency, an amount far in excess in proportion to the procedural defect the court alleges to have occurred. The courts have found that allowing a forfeiture in cases similar to this one, i.e. of $366,280.00, is excessive. We find that to be especially true given the lack of any evidence of wrongdoing.]

A. The Amount of Money Seized is Too Great a Penalty for an Alleged Procedural Defect:

Assuming, arguendo, that Rodriguez's money was justly seized and then properly forfeited, the Government's best legal position is that due to a procedural defect in the handling of his claim, $366,280.00 has been confiscated and forfeited. The Government failed to allege or show that Rodriguez did anything wrong. The forfeiture of almost $370,000.00 far exceeds the bounds of equity in such a case.

The Eighth Amendment to the United States Constitution provides against the imposing of "excessive fines" and "unusual punishments." Id. Where there is no guilt on the part of the claimant, the forfeiture is all the more drastic a remedy for the Government.

B. The Legal Climate Concerning Civil Asset Forfeitures:

Just over two years ago, the United States Supreme Court, in United States v. Bajakajian, 524 U.S. 321; 118 S.Ct. 2028; 1998 U.S. LEXIS 4172; 141 L. Ed. 2d 314 (Decided June 22, 1998), held that the taking of $357,144.00 in a civil forfeiture was grossly disproportionate to the claimant's failure to declare the currency.

In that case, customs inspectors found the claimant and his family preparing to board an international flight carrying $357,144. The claimant was charged with, inter alia, attempting to leave the United States without reporting, as required by 31 U.S.C. § 5316(a)(1)(A), that he was transporting more than $10,000 in currency. The Government also sought forfeiture of the $357,1 44.00 under 18 U.S.C. § 982(a)(1), which provides that a person convicted of willfully violating §5316 shall forfeit "any property . . . involved in such an offense." Id. The claimant pleaded guilty to the failure to report and elected to have a bench trial on the forfeiture.

The District Court found, among other things, that the entire $357,144.00 was subject to forfeiture because it was involved in the offense, that the funds were not connected to any other crime, and that Bajakajian was transporting the money to repay a lawful debt. Id.

Concluding that full forfeiture would be grossly disproportional to the offense in question and would therefore violate the Excessive Fines Clause of the Eighth Amendment, the court ordered forfeiture of $15,000, in addition to three years' probation and the maximum fine of $5,000 under the Sentencing Guidelines. The Ninth Circuit affirmed, holding that a forfeiture must fulfill two conditions to satisfy the Clause: The property forfeited must be an "instrumentality" of the crime committed, and the property's value must be proportional to its owner's culpability. Id.

While not addressing the exact statutory framework in which Rodriguez's case is found, the Supreme Court's message is clear: Even if found guilty, a claimant's fine should be in proportion to his culpability.

At about the same time as the Bajakajian decision, the House approved a measure that would curb the Government's

authority to seize property. With the Civil Asset Forfeiture Reform Act, which was passed only days prior to the preparation of the appeal brief in this case, Congress has made it more difficult for Federal and state law enforcement authorities to confiscate property before they bring criminal charges in narcotics and other cases. See H.R. 1658. Under the new legislation, the Government can confiscate property only if it first shows there is a substantial nexus between the property and the crime "by clear and convincing evidence." This shifts the burden from the original scheme, where the Government would only have to show probable cause, and the claimant would have the burden of proving that it is an "innocent owner." The legislation also eliminates the bond provision for owners claiming an interest in the seized property.

In both instances the representation made by this Supreme Court and by Congress is that the environment in which Rodriguez's taking took place is undergoing much-needed reform. Due process has been lacking, and Rodriguez's case is a perfect example.

CONCLUSION

This case involves questions of critical importance to the proper construction of the nation's seizure practices and forfeiture laws and how those laws and procedures are to be applied so as not to deny fair and due hearings and process.

If not reviewed, the District Court and Second Circuit decisions will lead to more unfair results. The decisions will deny claimants the right to contest the merits of a seizure and the right to a day in court without delay.

Circuit decisions will remain unclear and in conflict.

For these and all the foregoing reasons, Rodriguez's petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED AND FILED AUGUST 12, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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In re Seizure of Certain Property
including $370,000 more or less
on November 7, 1997

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98 CV 1026 (CBA)

MEMORANDUM AND ORDER

AMON, UNITED STATED DISTRICT JUDGE

Introduction

Luis Alberto Rodriguez-Rodriguez has moved pursuant to Fed. R. Crim. P. 41(e) for an order directing the return of approximately $370,000 in currency seized from him at LaGuardia Airport on November 7, 1997. The government in turn moved to dismiss his application for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1).

For the reasons that follow, the Court holds that it has no subject matter jurisdiction to review the merits of the subject forfeiture. The Court does have jurisdiction to address whether the administrative forfeiture proceeding comported with procedural due process. Since the Court finds no procedural infirmity, the government's motion to dismiss is granted.

Background

A. Seizure of the Subject Currency

On November 7, 1997, movant Rodriguez and his daughter, Maria Patricia Garay, were scheduled to take an American Airline's flight from New York's LaGuardia Airport to Miami. While at LaGuardia, an airport security officer stopped Rodriguez and questioned him about the contents of his luggage. Mr. Rodriguez informed the security officer that he was carrying money in connection with his business. After further questioning, he and his daughter were taken to a security office at LaGuardia.

Airport security personnel subsequently contacted Brian Fitzpatrick, a Special Agent of the United States Drug Enforcement Agency (the "DEA"), and requested that he participate in the investigation of Rodriguez. Special Agent Fitzpatrick conducted a further examination of Rodriguez at LaGuardia. A search of Rodriguez's person and his luggage uncovered $366,280 in currency, the vast majority of which consisted of old bills in $20 denominations. Special Agent Fitzpatrick seized the currency and certain personal property of Rodriguez and Garay on behalf of the DEA.[1]

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[1] In an affidavit filed in connection with this motion, Agent Fitzpatrick details certain responses given by Rodriguez which called into question his claim that he was a jewelry dealer.

On or about November 10, 1997, Solomon Antar, Esq., contacted Special Agent Fitzpatrick. Mr. Antar explained that he was an attorney representing Rodriguez and requested information on how Rodriguez could reclaim the currency and his personal property. Mr. Fitzpatrick explained that the matter would be turned over to the DEA Asset Forfeiture Unit and thereafter he provided Mr. Antar's name and address to that unit. On or about November 2, 1997, an individual acting on Mr. Antar's behalf picked up Rodriguez's personal property from the DEA. The DEA retained the subject currency. Thereafter, Mr. Fitzpatrick was contacted by Carl Soller, Esq., whom he also referred to the DEA Asset Forfeiture Unit.

B. The Forfeiture Proceedings

After a review of the forfeiture report concerning the currency seized from Rodriguez, the DEA concluded that probable cause existed for the seizure and accepted the case for administrative forfeiture. On December 15, 1997, the DEA mailed three written notices of the seizure. The first of these notices was sent by certified mail, return receipt requested, to Rodriguez's daughter, Garay, at 84-30 SW 81 LN, MIAMI, FL 33143. The second notice was sent by certified mail, return receipt requested, to Rodriguez, care of Solomon Antar, at 42 FALMOUTH ST., BROOKLYN, NY 11235. On December 23, 1997, an individual accepted delivery of this notice. The third notice was sent

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He also notes that Rodriguez had no explanation for the great number of $20 bills and that several days after the stop, a specially trained dog alerted positively to the presence of narcotics on the currency.

to Rodriguez at 144-50 SW 94th LN, MIAMI, FL 33186.[2] The Postal Service returned this notice to the DEA as undeliverable on January 6, 1998.

Each of the notices of seizure included the following information:

- The property seized and the date and place of the seizure;
- The person from whom the property was seized;
- Notice that the DEA has seized the property for forfeiture pursuant to 21 U.S.C. § 881 because it was used or acquired as a result of a drug-related offense;
- An explanation that a claimant could request remission (pardon) or mitigation of the forfeiture by submitting a petition for remission or mitigation within thirty (30) days from the receipt of the notice and a discussion of the procedures and requirements for filing such a petition;
- An explanation that in addition to or in lieu of filing a petition for remission or mitigation, a claimant could contest the forfeiture in federal district court; and

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[2] This address appears on the receipt for the currency seized that was completed by Federal Agent Fitzpatrick.

- A discussion of the procedures for commencing such an action in district court, including the requirement that a claimant must first file a claim of ownership and a cost bond (or, in the alternative, a Declaration in Support of Request to Proceed In Forma Pauperis) with the DEA within 20 days of the first publication of the notice of seizure in the USA Today.

On December 24, 1997, December 31, 1997, and January 7, 1998, the DEA published notice of the seizure of $366,280.00 in currency in USA Today. These notices also included the information outlined above, except that they set a January 13, 1998, deadline for filing a claim and posting a bond or for filing a petition for remission or mitigation.

On January 2, 1998, the DEA sent an additional written notice of seizure via certified mail, return receipt requested, to Rodriguez care of Carl Soller, the attorney representing Rodriguez in this proceeding.[3] This notice was accompanied by a letter stating that because of an unavoidable delay, the DEA would allow 20 days from the receipt of the letter and notice (as opposed to 20 days from the first date of publication in USA Today) for Rodriguez to respond as he deemed appropriate. An individual signing

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[3] Mr. Soller contacted Special Agent Fitzpatrick in early December 1997, to advise him that he would be taking over the representation of Rodriguez from Solomon Antar. Special Agent Fitzpatrick contends that he told Mr. Soller to notify the DEA Asset Forfeiture Unit that he was going to be representing Rodriguez because Special Agent Fitzpatrick previously submitted Mr. Antar's name as Rodriguez's attorney.

as the "Addressee or Agent" accepted delivery of this notice on January 8, 1998.

The DEA sent a final written notice of seizure on January 14, 1998, to MS. MARIA PATRICIA GARAY A/K/A, MARIA PATRICIA RODRIGUEZ-GUZMAN, 84-30 S.W. 81st LANE, MIAMI, FL 33143. A letter accompanying this notice similarly provided 20 days from receipt to respond. An individual accepted delivery of this notice as the "Addressee or Agent." Both the notice sent to Mr. Soller and the second notice sent to Garay included the information outlined above.

On January 13, 1998, the DEA received a letter from Mr. Soller, dated January 8, 1998, concerning the notice of seizure. In this letter, Mr. Soller asserted that the notice of seizure contained deficiencies "in a number of categories." In particular, Mr. Soller assailed the failure of the DEA to identify what "drug related offense" justified the seizure of the currency or the "provision of law that authorized a seizure under the circumstances of this particular case." Mr. Soller requested such information on behalf of his client, stating that this "information is absolutely essential in order for us to properly proceed with our petition for remission under Title 19, Sec. 1607, et seq," (Rashid Docl. Ex. 9.)."

On January 21, 1998, the DEA sent a letter to Mr. Soller to address the issues raised in his January 8, 1998 letter. The DEA stated its belief that the notice of seizure provided to Rodriguez comported with constitutional due process standards. The DEA indicated that "the currency in question was seized because there was probable cause to believe [it] was furnished or intended to be furnished in exchange for a controlled substance; was traceable to such an exchange; or was intended to facilitate a violation of

21 U.S.C. §§ 801-890 (Subchapter 1 of the Controlled Substances Act)." (Rashid Decl. Ex. 12.) The DEA further advised, however, that it was not required to trace seized currency to a particular transaction. Finally, the DEA commented on Rodriguez's counsel's representation that he intended to file a petition for remission and/or mitigation. Noting that Rodriguez appeared to challenge the merits of the seizure, the DEA cautioned that in reviewing a petition for and/or mitigation, the reviewing official must presume a valid forfeiture and therefore cannot consider the sufficiency of the evidence supporting that forfeiture.

Rodriguez never filed a petition for remission and/or mitigation, nor did he file a claim and post a bond with the DEA. Instead, on February 18, 1998, Rodriguez commenced the instant action by filing a motion for the return of the currency pursuant to Fed. R. Crim. P. 41(e), which provides, in part:

> A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. Fed. R. Crim. P. 41(e).

Rodriguez contends that the DEA unlawfully seized the subject currency in violation of his constitutional rights under the Fourth Amendment. The 20-day period for filing a claim and bond with the DEA expired on January 28, 1998. The 30-day period for Filing a petition for remission or mitigation expired on February 7, 1998.

This action was filed on February 12, 1998. On February 23, 1998, the DEA declared the subject currency forfeited.

Discussion

The government has moved to dismiss this action for lack of subject matter jurisdiction. The government contends that under controlling Second Circuit precedent, once the DEA has commenced administrative forfeiture proceedings, a court's jurisdiction to review that forfeiture is limited to a consideration of whether the agency has adhered to the appropriate procedural safeguards. Asserting that no procedural deficiencies exist in this case, the Government concludes that the Court should dismiss this action.

Rodriguez advances three arguments in opposition to the government's motion. First, he argues that the administrative proceedings did not divest the Court of its inherent equitable authority to entertain the pending Rule 41(e) motion and consider the merits of the forfeiture. Second, and in the alternative, he contends that the administrative process leading to the forfeiture of the subject currency was procedurally deficient. Finally, Rodriguez submits that the DEA improperly declared a forfeiture after he had declared his interest in the subject property, albeit not by filing a claim or a petition for remission and/or mitigation.

A. Statutory and Regulatory Framework

The DEA seized the subject currency on the stated basis that it had probable cause to believe the currency was subject to forfeiture pursuant to 21 U.S.C. §881(a). That section provides, in relevant part, as follows:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them: . . . . . (6) All moneys . . . furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys . . . . . used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of a owner, by reason of any act or omission by that owner to have been committed without the knowledge or consent of that owner.

21 U.S.C. §881(a) statutory provisions governing the seizure and disposition of property for violations of the customs laws also apply to seizures pursuant to §881. See 21 U.S.C. § 881 (d).

Because the subject currency in this case totaled less than $500,000, tho DEA was permitted to initiate administrative, as opposed to judicial, forfeiture proceedings. The statute governing administrative forfeiture required the DEA, upon seizure, to

> cause a notice of the seizure of [the seized property] and the intention to forfeit and sell or otherwise dispose of the same according to law to be published for at least three successive weeks in such manner as the Secretary of the Treasury may direct. Written of seizure together with information applicable procedures shall be sent to each party who appears to have an interest in the seized article.

19 U.S.C. §1607(a). The publication and delivery of these notices constitutes the commencement of administrative forfeiture proceedings. See Onwubiko v. United States, 969 F.2d. 1392, 1398 (2d. Cir., 1992).

Upon the commencement of administrative proceedings, a person claiming an interest in the seized property has two options. First, the claimant may file a "petition for remission or mitigation of forfeiture." See 21 C.F.R. § 1316.79. Such a petition is a purely administrative remedy, addressed to the Administrator of the DEA. See id. § 1316.79(a). It must be filed within 30 days of receipt of the notice of seizure. See id. § 1316.80(a).

Claimants may also pursue a judicial remedy, either in addition to or instead of the administrative remedy. The claimant "May at any time within twenty days from the date of the first publication of the notice of seizure file . . . . a claim stating his interest [in the property]." 19 U.S.C. § 1608. [4] The claim must be accompanied by a bond with approved sureties. See id. If "no such claim is filed or bond is given" within the allotted 20 days, the property is declared forfeited. See 19 U.S.C. § 1609(a); 21 C.F.R. § 1316.77(a). If an appropriate claim and bond are received, the DEA Asset Forfeiture Section transmits information concerning the seizure to the U.S. Attorney for the relevant district for the purpose of instituting condemnation proceedings. See 19 U.S.C. § 1608; 21 C.F.R. § 1316.78.

Rodriguez's chosen course of action was neither the prescribed judicial remedy nor the administrative remedy.

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[4] In this case, due to a delay, the DEA expressly allowed 20 days from receipt of the notice rather than from the first date of publication.

B. Subject Matter Jurisdiction over the Merits of the Forfeiture

The central issue raised by the government's motion is whether there exists a jurisdictional basis for the Court to review merits of the forfeiture at issue. The government maintains that the commencement of an administrative forfeiture proceeding divests a district court of subject matter jurisdiction over the merits of a forfeiture. Rodriguez responds that the Court's inherent equitable jurisdiction, as embodied in Fed. R. Crim. P. 41(e), provides an independent jurisdictional basis for the Court to reach the merits of his claim that the DEA seized his currency in violation of the Fourth Amendment.

It is the law of this circuit that "an administrative forfeiture ordinarily removes the subject matter of the action - the property or res - from the district court and thereby deprives the court of jurisdiction to review administrative decisions once the administrative process has begun." Borero v. DEA, 111 F.3d 301, 304-05 (2d Cir. 1997) (citing Onwubiko v. United States, 969 F.2d. 1392, 1398 (2d. Cir., 1992).; see also Toure v. United States, 24 F.3d 444, 446 (2d Cir. 1994); United States v. One 1987 Jeep Wrangler Auto. VIN #2BCCL8132HBS12835, 972 F.2d. 472, 479 (2d Cir. 1992); Omoregie v. United States, No. 94 CV 2098 (JG) 1995 WL 761848, at *2 (E.D.N.Y. Doc 20, 1995).

Review of a completed forfeiture "is limited to determining whether the administrative process, either in the way it was carried out in the particular instance or in the procedural rules themselves, failed to afford the petitioner due process." Omoregie v. United States, 1995 WL 761848, at *2; See also Lopes v. United States, 862 F. Supp. 1178, 1185 (S.D.N.Y. 1994). Accordingly, where a forfeiture proceeding has been properly conducued, a plaintiff is not entitled to

have a district court review the merits of the seizure. This is true whether the review is sought pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure or under what has been described as the court of "civil equitable" jurisdiction. See Mullins v. United States, No. 96 Civ. 0241 (MBM), 1997 WL 55946, at *2 (S.D.N.Y. Feb. 11, 1997); see also Shaw v. United States, 891 F.2d 602, 603 (6 Cir. 1989).

The cases cited by Rodriguez do not compel a different result. Even assuming that c could be appropriately invoked as a sources of jurisdiction to address the propriety of the seizure, it would not be appropriate to exercise that jurisdiction here. Central to the exercise of equitable jurisdiction is a showing that there is no adequate remedy at law. See Boyd v. United States Department of Justice, 673 F.Supp.660, 664 (E.D.N.Y. 1987) (stating that "the adequacy of movant's remedy at law is most significant" for determining whether court should exercise anomalous jurisdiction); United States v. An Antique Platter of Gold, 95 MAG. 2167 (NRB), 1995 WL 758762, at *1 (S.D.N.Y. Dec. 22, 1995) ("[A] court should not find 'anomalous' jurisdiction when the movant has an available statutory or civil remedy to contest ownership of the property and thc lawfulness of the seizure."). Citing this principle, courts in this circuit consistently have declined to exercise anomalous jurisdiction over a Rule 41(e); motion filed after the commencement of administrative forfeiture proceedings. See, e.g.,United States v. Antique Platter of Gold, WL 758762, at *1 (noting that a Rule 41(e) motion generally should be dismissed when a civil forfeiture proceeding is pending" and declining to exercise anomalous jurisdiction over Rule 41(e) motion); Boyd v. United States Department of Justice, 673 F.Supp. at 663 ("'Anomalous' jurisdiction is inappropriate when no criminal proceedings are pending at the time the motion is filed and when the

movant has a readily available statutory remedy to contest ownership of property and the lawfulness of the seizure, as well as other available civil remedies."). The rationale underlying these decisions is that, once the administrative proceedings are commenced, the statute governing the filing of a claim and bond provides an adequate legal remedy.

It is not a distinguishing feature that the final declaration of forfeiture in this case took place after Rodriguez filed his Rule 41(e) motion. Equity generally will not come to the aid of a litigant who chooses not to pursue available legal avenues for relief. See $6470.00 v. United States, 901 F.2d 1540, 1545 (11th Cir. 1990) ("It is inappropriate for a court to exercise equitable jurisdiction to review the merits of a forfeiture matter when the petitioner selected to forgo the procedures for pursuing an adequate remedy at law."); Shaw v. United States, 891 F.2d 602, 603 (6 Cir. 1989) ("Here [the claimant] ignored [the administrative forfeiture procedures] and sought to use the equitable remedy rather than pursuing the legal remedy. Under standard equity doctrine, where there is an adequate remedy at law it must be pursued."); United States One 1988 Mercedes Benz, VIN #WDBBA48D5JA087263, 719 F. Supp. 595, 599 (E.D. Mich. 1909) ("[The claimant] has a legal remedy available to him and seemingly has chosen not to use it..... well settled general principles of equity preclude exercise of equity jurisdiction to accomplish what could have been accomplished at law."). At oral argument on the government's motion to dismiss, Rodriguez's counsel conceded that Rodriguez's failure to pursue his legal remedy of filing a claim and bond during the pendency of the administrative proceeding was a calculated decision. (Transcript at 5, 19.}

The exercise of anomalous or equitable jurisdiction over Rodriguez 's Rule 41(e) motion to reach the merits of

the forfeiture proceeding is not appropriate in this case. Rodriguez was fully aware of the administrative forfeiture proceedings against the subject currency, and the mechanisms for challenging that forfeiture, yet he chose not to pursue his legal remedy by filing a notice of claim and posting a bond. [5] Rodriguez has offered no compelling justification for his admittedly intentional inaction or credible showing that his legal remedies were inadequate.

Rodriguez asserts that a civil forfeiture action would taint his reputation and that if he had filed a clalm and posted a bond, he would have no means of insuring that the government would commence and pursue the forfeiture action expeditiously. The fact that a litigant may have found an adequate legal remedy undesirable for some reason does not entitle that litigant to equitable relief. Further, the reasons proffered by Rodriguez here do not even suggest that the statutory remedy was inadequate. As to his first reason, the Court fails to understand how the "taint" to Rodriguez's reputation is less severe in a Rule 41(e) action than it would have been in a judicial forfeiture action. As to his second reason, the Court notes that the government is constrained not only by the 5-year statute of limitations governing forfeiture proceedings but also by the Due Process Clause in its discretion as to the commencement of forfeiture actions. See United States v. $8,850, 461 U.S. 555 (1983); See also Creative Electric Inc. v. United States, No. 95-CV-0302 (RSP/GJD), 1995 WL

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[5] At oral argument, Rodriguez's counsel was asked whether he made a "conscious and deliberate choice" not to pursue the statutory route for judicial review. Counsel replied: "Yes . . . we made a conscious effort to proceed pursuant to Rule 41(e) (Transcript at 5.) Counsel also indicated that he "understood the alternative course." Of pursuing the statutory remedies (id. at 19.).

494002, at 6-7 (N.D.N.Y. Aug. 16, 1995) (directing DEA to initiate judicial proceeding after delay of 16 months).

The two principles cases relied upon by Rodriguez do not require a different conclusion. In Camacho v. United States, 645 F. Supp. 725 (E.D.N.Y. 1986), the court found that the claimant's failure to pursue her legal remedies pursuant to the administrative forfeiture proceedings did not preclude consideration of a post-forfeiture Rule 41(e) motion. The court reasoned that "[e]ven if plaintiff waived her rights under §1608 by failing to post a bond in the required amount, such a waiver does not prejudice her right to move for relief under Fed. R. Crim. P. 41(e). The two remedies are distinct and the plaintiff may choose either one." Id. at 727. In Camacho, as in this case, no criminal action was commenced or threatened against the claimant. See id. at 726-27.

This Court concludes that the Camacho decision was wrongly decided and declines to follow it for a number of reasons. First, the Camacho court itself never analyzed the jurisdictional basis for its consideration of the Rule 41(e) motion in the pending civil action or addressed the equitable principles governing the relief sought. More importantly, the Camacho decision has been undermined by the more recent Second Circuit decisions in One 1987 Jeep Wrangler and Onwubiko, which rejected reliance on Rule 41 (e) in the absence of a criminal proceeding. Even prior to those more recent decisions, courts have refused to follow Camacho. See United States v. One Black Buick Auto, 725 F. Supp. 148, 150 (W.D.N.Y. 1989) (noting that Camacho had been expressly rejected in United States v. $83,310, 851 F.2d 1231, 1233 (9th Cir. 1988)). Given the lack of analysis in Camacho, the contrary Second Circuit precedent and its specific rejection by other courts, the

Court does not find it persuasive authority.[6]

Another case relied upon by Rodriguez is the Tenth Circuit's decision in Floyd v. United States, 860 F.2d 999 (10th Cir. 1988). The Court notes initially that it is not bound by a decision from the Tenth Circuit. In any event, Floyd is factually distinct. In Floyd, the claimant filed a Rule 41(e) motion before the commencement of administrative forfeiture proceedings against the subject property. After the filing of the Rule 41(e) motion on September 18, 1987, the government indicated that administrative proceedings would be commenced with the publication of notice on or about October 21, 1987. Such publication did not occur and the court held a hearing on the Rule 41(e) motion on November 23, 1987. Notice was published on December 2, 1987, and the court entered its order on December 30, 1987.

The Court of Appeals for the Tenth Circuit found that the district court did not abuse its discretion by retaining jurisdiction over the Rule 41(e) motion after the publication of notice. The court reasoned that at the time of the hearing, no administrative proceedings had been commenced, so the claimant did not hawe an available legal remedy under the forfeiture laws. The same cannot be said here, since Rodriguez filed his Rule 41(e) motion subsequent to the initiation of the administrative proceeding. He had a legal remedy available to him under the forfeiture laws in the then-pending administrative proceeding.

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[6] The Court also notes that no district court in the Second Circuit has relied upon Camacho for the propositions cited by Rodriguez since the Second Circuit issued its 1992 decisions in One 1987 Jeep Wrangler and Onwubiko.

In sum, the Court finds that Rule 41(e) does not provide a basis, in this case, for subject matter jurisdiction over the merits of the subject forfeiture. Rodriguez chose, for apparently misguided strategic purposes, to forego his legal remedies in the administrative proceeding, and equity will not now come to his aid.

C. Rodriguez's Procedural Claims

Even though the Court lacks jurisdiction to consider the merits of the subject forfeiture, the government concedes that the Court has jurisdiction to consider the procedural sufficiency of the forfeiture proceedings against the subject currency. See Onwubiko 969 F.2d 1398 (" [I]f an administrative forfeiture is procedurally deficient, the court has jurisdiction to correct the deficiency."); Valencia-Romero v. United States, No. 97 CV 6723, 1998 WL 938949, at *2 (E.D.N.Y. Nov. 18, 1998) (same).

Rodriguez contends that both the service of the notice of seizure and the notice itself failed to comport with the requirements of procedural due process. He cites several purported defects in this regard. For instance, he notes that: (1) the DEA originally sent notice to the wrong attorney; (2) the DEA never personally served him; (3) publication of notice preceded service of notice to his current attorney; (4) the twenty days afforded did not provide adequate time for his attorney to contact him and prepare a claim; and (5) the notice did not set forth the facts justifying the forfeiture such that he could make an informed choice with regard to the remedy to seek.

The court does not find any of these arguments as to the propriety of notice persuasive. First, the Court is not moved by Rodriguez 's arguments concerning whether

the notice was delivered to the correct attorney or to him personally. The DEA sent multiple notices of seizure, one of which unquestionably was received by Rodriguez's present attorney in this matter. Further, the last notice sent to Rodriguez, in care of his counsel, expressly provided that his time to respond would not begin until his receipt of the notice, thus making any previous delays or inadequacies in service irrelevant to the due process question. His daughter also received such a notice on one, and perhaps two, occasions. All that is required is that the DEA deliver notice "reasonably calculated" to apprise interested parties of the administrative action. See United States v. Cruz, No. S2 97 Ct. 54 (RPP), 1998 WL 326732, at *2 {S.D.N.Y. June 19, 1998) (quoting Weigner v. City of New York, 852 F.2d 646, 649 (2d Cir. 1988)); See also Bye v. United States, 105 F.3d 856, 857 (2d Cir. 1997) (holding notice to claimant's attorney in pending criminal matter to be sufficient). Further, due process is clearly satisfied when, as here, actual notice of administrative action is undisputed. See One Jeep Wrangler, 972 F.2d at 482, Lopes v. United States, 862 F.Supp. 1178, 1187-88 (S.D.N.Y. 1994).

Rodriguez also has no valid objection to the content of the notice. The notice in question set forth in understandable terms the nature of and authority for the forfeiture proceedings and the means by which Rodriguez could (a) challenge the forfeiture and/or (b) seek remission and/or mitigation. Courts generally have not required more. See e.g. Sterling v. United States, 749 F, Supp. 1202, 1210-33 (E.D.N.Y. 1990) (finding that notice worded similarly to notice at issue in this case comported with due process standards). Rodriguez provides no legal authority support his position that the notice must set forth the facts supporting the determination that there was probable cause to seize the funds.

D. Rodriguez's Expression of an Interest in the Property

Finally, Rodriguez asserts that the DEA improperly forfeited the currency after he had clearly expressed an interest in the property. Rodriguez notes that his attorneys were in contact with the DEA concerning the return of his property beginning almost immediately after the seizure. Furthermore, the January 8, 1998, letter from Rodriguez's attorney to the DEA expressly stated Rodriguez's position that the funds in question were not related to any drug offense. Finally, after the time period for filing a claim and posting bond with the DEA expired but before the declaration of forfeiture, Rodriguez filed the pending 41(e) motion seeking the return of his property. Rodriguez submits that these actions and circumstances sufficiently apprised the DEA of his interest in the subject currency The DEA's subsequent forfeiture of the currency with knowledge of this interest, he submits, was improper. The Court has jurisdiction to consider this argument to the extent that it arguably relates to the procedural sufficiency of the administrative forfeiture and not to the merits of the seizure itself.

The Second Circuit has recognized that administrative forfeiture is appropriate only in cases where the seized property goes unclaimed. Indeed, administrative forfeiture is, in reality, a non-proceeding -- it is merely the consequence of no one having come forward to claim the property seized or contest its forfeitability." United States v. Idowu, 74 F.3d 387, 394 (2d Cir. 1996). Consistent with this view, the Second Circuit has directed that courts should construe forfeiture claims liberally, such that "technical noncompliance with the procedural rules governing the filing of forfeiture claims will be excused where there is a sufficient showing of interest in the property." One 1987 Jeep Wrangler, 972 F.2d at 481.

The Court notes initially that the letter written by Rodriguez's counsel to the DEA was insufficient to put the DEA on notice that Rodriguez intended to pursue a judicial remedy to recover the subject currency. At most, it indicated to the DEA that he was considering the assertion of a property interest by pursuing the administrative remedy of a petition for remission or mitigation.[7] The pursuit of such a remedy does not end administrative forfeiture proceedings. The DEA responded promptly to Rodriguez's letter, and the response was delivered well within the 20-day period during which he might have filed a claim and bond. Further, the DEA's response reminded Rodriguez of the 20-day filing period for claims, suggesting that the DEA did not interpret counsel's letter as a claim or other clear assertion of Rodriguez's statutory right to judicial review.

Because the January 8, 1990, letter was insufficient to put the DEA on notice of Rodriguez's asserted interest, the question becomes whether the filing of this action, after the 20-day period had expired, should have prevented the forfeiture of the subject currency.

Rodriguez cites several case in which courts have held that the DEA improperly forfeited property because the claimant in question had asserted his or her interest in the property, albeit not in a form compliant with the procedural requirements. In One 1987 Jeep Wrangler, for example, the claimant filed a notice of claim before the commencement of the administrative forfeiture and failed to

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[7] Indeed, the letter does not refer to the possibility of filing a claim and bond at all, and refers only to the possibility that Rodriguez would, in the future, by filing a petition for remission or mitigation. (Rashid Decl. Ex. 9 at 2.)

post a bond. The DEA had decided to treat the filed notice of claim as relating to a prior notice of seizure that had been abandoned by the DEA. The Court of Appeals for the Second Circuit found this decision to be arbitrary. Although the Court of Appeals was "troubled" by the claimant's failure to post a bond, it concluded that "the import of the claim is that [the claimant] took affirmative action to protect this rights in the defendant Jeep. Id. at 481.

In Muhammed v. DEA, 92 F.3d 648 (8th Cir. 1996), the claimants filed an action for the return of their property before the commencement of the administrative forfeiture proceedings. When the DEA subsequently instituted such proceedings, the claimants did not file a claim and post bond. Rather, they amended their complaint to include the notice of seizure, and then sent copies of the amended complaint, together with affidavits, receipts and a cover letter requesting release of the property to the DEA.

The DEA treated this submission as a petition for remission and/or mitigation and forfeited the property. The Court of Appeals for the Eighth Circuit found the forfeiture to be void for want of due process. Specifically, the court reasoned that the notice did not adequately explain the effect of an administrative forfeiture proceeding on a pending action for the return of property. The court emphasized that the claimants had put the DEA on notice of their interest in the property and of their confusion regarding the requirements for pursuing their claim administratively.

Finally, Rodriguez cites the 5th Circuit's decision in Scarabin v. DEA, 919 F.2d 337 (5 th Cir. 1990). In Scarabin, the claimant improperly filed a motion for expedited release property in response to the DEA's notice of seizure. The DEA denied the motion and, after the

claimant did not file a claim and bond or a petition for remission and/or mitigation, it forfeited the property. Noting that the claimant's motion included essentially all of the information required in a petition for remission and/or mitigation, the court concluded that the DEA should be required to review the merits of his petition.

The cases relied upon by Rodriguez are distinct from the instant case in one important respect - in each of the cited cases, the deficiency in the claimant's chosen course of action was a result of a mistake, and not of a conscious decision to pursue another remedy with no attempt to adhere to the statutorily prescribed administrative regime. For instance, in One 1987 Jeep Wrangler, the court noted that it was "troubled by the claimant's failure to file a bond. See 972 F.2d at 481. However, the court found it "conceivable that the claim was intended as either a claim for judicial intervention or as a petition for remission and/or mitigation." Id. In the present case, however, Rodriguez indicates in his papers and claimant's counsel indicated at oral argument that claimant's course of action in the administrative proceeding was expressly not an attempt to seek remission and mitigation, or an attempt to invoke the statutory provision for judicial review. (Transcript at 5,19.) Under the facts of this case, it is not "conceivable," therefore, that Rodriguez's actions were attempts to pursue the legal remedies provided by statute. Additionally, in One 1987 Jeep Wrangler, the court construed the claim filed by the claimant as pertaining not to the first seizure of the claimant's property, as to which it would be untimely but to the second seizure of the claimant's property, as to which the Court decided the claim was not untimely. Here, Rodriguez clearly filed his action after the 20-day period for filing claims had expired.

In Muhammed, as in this case, the claimant pursued a Rule 41(e) motion instead of filing a claim and bond. However, in Muhammed there was no conscious decision to forego the claim and bond procedure. Rather, the claimant's failure to file the "claim and bond" was an error, . . . , an understandable one brought on by the inadequacies of the DEA's notice." 92 F.3d at 652. The Muhammed court further noted that "equity is sometimes tolerant of errors." Id. Here, on the contrary, Rodriguez intentionally chose not to pursue the statutory claim remedy, despite clear notice of the proper procedures for pursuing that remedy. Equity may be tolerant of errors, but it is not tolerant intentional decisions not to pursue legal remedies.

Finally, the Scarabin case also involved a distinct factual scenario. In that case, the claimant filed, with the DEA, a motion for expedited release of certain seized property, See 919 F.2d at 338. The DEA "correctly denied" the motion because expedited release is appropriate only for funds seized for possession of personal use quantities of drugs, and Scarabin's money was seized as purported proceeds of drug sales." Id The court found that the DEA should have considered the claimant's motion to be a petition for remission or mitigation, because it "contained essentially all of the information required for" such a petition. See Id. at 339. The claimant in Scarabin simply made an error by seeking a kind of relief within the administrative scheme that was not available to him. Unlike the instant case, the claimant in Scarabin did not make a conscious, strategic decision to forgo remedies known to be available to him in order to pursue another course of action. Also, the Scarabin court did not treat the claimant's submission as constituting a basis for judicial relief, but merely directed that it be treated as a petition for relief within the administrative regime.

Rodriguez here asks the court to do more.

Rodriguez chose to pursue a remedy that turned out to be unavailable to him.[8] Despite being on full notice of the two statutorily authorized remedies for wrongful seizures, he decided to do something else.[9] Nothing that the DEA did in relation to this administrative proceeding violated any provision of the forfeiture laws. The DEA thus properly forfeited the subject currency because no party had come forward within the statutorily-defined period to properly assert an interest in it or to ask to pursue the issue in a judicial forum.

Conclusion

For the reasons discussed above, the Court grants the government's motion to dismiss. This case is closed.

SO ORDERED.

Dated: Brooklyn, New York
August 12, 1999

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[8] The Court notes that Rodriguez may have other remedies available to him. See Muhammed vs. DEA Asset Forfeiture Unit, 92 F.3d 648, 654 n.7) (8th Cir. 1996), but expresses no opinion as to any potential merit of any claims not presented here.

[9] Even if the Rule 41(e) motion could be deemed an appropriate replacement for the claim and bond procedure, Rodriguez filed this action 11 days after the 20-day period for filing a claim and bond had expired. According to the regulation, the property became forfeitable at the expiration of the 20-day period, or on January 28, 1998. See 19 U.S.C. § 1609(a); 21 C.F.R. § 1316.77(a). The DEA received no indication that Rodriguez was asserting his right to a judicial remedy during that 20-day period.

APPENDIX B

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DATED AND FILED AUGUST 13, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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In re Seizure of Certain Property
including $370,000 more or less
on November 7, 1997

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98 CV 1026 (CBA)

A Memorandum and Order of the Honorable Carol B. Amon, United States District Judge, having been filed on August 13, 1999; granting the government's motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1); it is

ORDERED and ADJUDGED that the government's motion for dismiss is granted.

Dated: Brooklyn, New York
August 13, 1999

ROBERT C. HEINEMANN
Clerk of Court

By: /s/

James Giokas, Chief Deputy Clerk

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AND DECIDED FEBRUARY 22, 2001

COURT OF APPEALS
SECOND CIRCUIT

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LUIS ALBERTO RODRIGUEZ,
Petitioner-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE and
DRUG ENFORCEMENT ADMINISTRATION,
Respondents-Appellees.

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No. 99-6337

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is AFFIRMED.

Petitioner-appellant Luis Rodriguez appeals from an August 13, 1999 judgment of the United States District Court for the Eastern District of New York (Amon, J.), dismissing the action for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1). On appeal, Rodriguez argues: (1) that the

district court should have entertained Rodriguez's challenge, pursuant to Fed.R.Crim.P. 41(e), to the legal sufficiency of the currency seizure; (2) that forfeiture of the currency was improper after Rodriguez expressed an interest in the property; and (3) that the administrative proceedings were procedurally flawed.

On November 7, 1997, Rodriguez and his daughter arrived at Laguardia Airport in New York City in order to embark on a flight to Miami. After passing through security, plaintiff was stopped and questioned by Port Authority detectives and Brian Fitzpatrick, Special Agent in the Drug Enforcement Agency ("DEA"). The investigation revealed that Rodriguez was carrying $366,280 in U.S. currency, largely in small bills. Rodriguez, who speaks only Spanish, was questioned through an interpreter. Rodriguez told investigators that the cash was related to his jewelry business, but was unable to give specifics regarding the business. Plaintiff and his daughter were permitted to leave, but Special Agent Fitzpatrick seized the currency. On November 10, 1997, a trained police dog reacted positively to the presence of narcotics on the bills.

On December 15, 1997, the DEA sent three Notices of Seizure by certified mail: one to plaintiff which was returned to the DEA as undelivered, one to Rodriguez's daughter which appears to have been received, and one to Rodriguez's first attorney which was delivered. Beginning December 24, 1997, the DEA published notice of the seizure for three successive weeks in USA Today.

On January 2, 1998, the DEA sent another Notice of Seizure to plaintiff's new attorney, Carl Soller. A cover letter indicated that although the notice stated that all parties have 20 days from the first date of publication in USA Today, the DEA would provide Rodriguez until January 28th to respond, 20 days from receipt of the notice sent to Soller. On January 8, 1998,

Soller argued, by letter, that the notice was deficient in several respects. On January 21, 1998, the DEA responded with a letter stating that a federal court had deemed the content of the notice constitutionally sufficient.

On February 12, 1998, approximately two weeks after the DEA deadline, Rodriguez filed in district court a motion for return of property pursuant to Fed.R.Crim.P. 41(e). On February 23, 1998, the DEA formally processed forfeiture of the currency to the United States. On March 20, 1998, the government moved to dismiss the 41(e) action, and on August 12, 1998, the district court dismissed the action for lack of subject matter jurisdiction pursuant to Fed.R .Civ.P. 12(b)(1).

This court reviews the grant of dismissal for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1) de novo. See Jaghory v. New York State Dep't of Educ., 131 F.3d 326, 329 (2d Cir.1997).

Congress has authorized the DEA to seize money furnished or intended to be furnished in exchange for a controlled substance. See 21 U.S.C. § 881(a)(6). If the currency is less than $500,000, the DEA may proceed administratively. See 19 U.S.C. § 1607; Boero v. Drug Enforcement Admin., 111 F.3d 301, 304 (2d Cir.1997). An administrative forfeiture commences with the publication of notice. See 19 U.S.C. § 1607. Within 20 days of the first publication of notice, the claimant may contest the forfeiture by filing a claim and a cost bond with the DEA. See 19 U.S.C. § 1608; Boero, 111 F.3d at 304. If the claimant fails to file a claim and cost bond, administrative forfeiture occurs by default. See 19 U.S.C. § 1609; Boero, 111 F.3d at 304.

Aside from limited exceptions not relevant here, see Boero, 111 F.3d at 305, federal courts have no jurisdiction to review the merits of an administrative forfeiture proceeding

outside of the claim and bond procedure. See U.S. v. One 1987 Jeep Wrangler, 972 F.2d 472, 480 (2d Cir.1992). The filing of a claim and bond stops the administrative procedure and compels the DEA to refer the matter to the relevant United States Attorney, who is required to initiate judicial forfeiture proceedings. See Boero, 111 F.3d at 304-05; see also One 1987 Jeep Wrangler, 972 F.2d at 479. In judicial forfeiture proceedings the plaintiff can challenge the legality of the seizure. See, e.g., United States v. $37,780 in United States Currency, 920 F.2d 159, 162-63 (2d Cir.1990). Because Rodriguez failed to file a claim and cost bond by January 28th, the district court could not adjudicate the merits of the underlying seizure and properly dismissed the action for want of subject matter jurisdiction.

On appeal, Rodriguez argues that the district court should have entertained his challenge to the legality of the currency seizure based on his claim that, at the time of the seizure, probable cause was lacking. He further contends that the 41(e) motion was the only procedure in which he could challenge the existence of probable cause at the time the seizure occurred. However, the law is clear that "once the administrative process has begun, the district court loses subject matter jurisdiction to adjudicate the matter in a peripheral setting such as a Rule 41(e) motion." One 1987 Jeep Wrangler, 972 F.2d at 479. The law is equally clear that even if Rodriguez had timely filed a claim and cost bond, thus enabling the district court to review the merits of the seizure, the government, during the judicial forfeiture proceeding, could proffer evidence gathered after the initial seizure to prove that it had probable cause at the time of the initial seizure. See $37,780 in United States Currency, 920 F.2d at 163-64. Thus, Rodriguez is correct that the claim and bond procedure precludes an evaluation of probable cause that excludes circumstances beyond those that existed at the time of the seizure. To be sure, the effect of the procedural setting which this case presents is that Rodriguez is unable to mount a

challenge to the seizure based on the probable cause determinants as they existed at the time of the seizure. But the fact that the appropriate rules, properly applied, yield a result not to Rodriguez's liking is not a reason for us to engage in a course of remedial legislation. His remedy, if any, lies with Congress not with the courts.

This court retains jurisdiction for the limited purpose of determining whether administrative forfeiture was procedurally proper. See Onwubiko v. United States, 969 F.2d 1392, 1398 (2d Cir.1992). Rodriguez argues that the notices of the seizure were deficient in both form and content. We disagree. At the very least, Rodriguez received actual notice of the initiation of the forfeiture proceedings through his attorney on January 8, 1998. Moreover, as the district court noted, the notices were also sufficient because they set forth in understandable terms the nature and authority for the forfeiture proceedings and the means by which Rodriguez could (a) challenge the forfeiture by filing a claim and cost bond and/or (b) seek remission and mitigation. See, e.g., Sterling v. United States, 749 F.Supp. 1202, 1210-11 (E.D.N.Y.1990).

We have considered Rodriguez's remaining arguments and consider them to be without merit. Accordingly, we AFFIRM the judgment of the district court.

FOR THE COURT:

ROSEANN B. MacKENCHNIE, Clerk

By:

/s/

Lucille Carr, Deputy Clerk

APPENDIX D

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AND FILED JULY 5, 2001

COURT OF APPEALS
SECOND CIRCUIT

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LUIS ALBERTO RODRIGUEZ,
Petitioner-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE and
DRUG ENFORCEMENT ADMINISTRATION,
Respondents-Appellees.

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No. 99-6337

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Luis Alberto Rodriguez.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT:

ROSEANN B. MACKENCHNIE, Clerk

By:

/s/

Beth J. Meador
Administrative Attorney